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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1301

MARION EDWARD WILLIAMS,
Petitioner,

vs.

STATE OF IOWA,
Respondent.

BRIEF FOR THE RESPONDENT IN RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

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INDEX

Opinions Below 1
Jurisdiction 1
Constitutional and Statutory Provisions Involved 2
Questions Presented 3
Statement of the Facts 3
Reasons for Denial of Writ 5
Conclusion 14

Citations

CASES

Merritt v. *State*, 245 Ind. 362, 198 N.E.2d 867 (1964) 9
State v. *Goodwin*, 181 Neb. 616, 150 N.W.2d 135 (1967) 11
State v. *Sanchez*, 13 Utah 2d 307, 373 P.2d 695 (1962) 10
State v. *Williams*, 171 N.W.2d 521 (1969) 5, 12, 13

STATUTES

1962 Code of Iowa, Section 204.8 .....6, 7, 8
1962 Code of Iowa, Section 204.9(4) 6, 7, 8
1966 Code of Iowa, Section 204.8(5) 2, 3, 5, 6, 8, 11
1966 Code of Iowa, Section 204.9 .....2, 3, 6, 8, 11, 12, 13
1966 Code of Iowa, Section 204.20(1) 2

AUTHORITIES

25 A.L.R.3d 1118 (1969) 9

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CITATION TO OPINIONS BELOW

The petitioner's citations are deemed sufficient.

JURISDICTION

The statement of jurisdiction in petitioner's application is deemed sufficient.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The citation of Amendment XIV, Constitution of the United States, as quoted in petitioner's application is deemed sufficient.

Section 204.8(5), Code of Iowa, 1966:

> "5. Except as otherwise provided, this chapter shall not apply to the administering, dispensing, or selling of any preparation containing not more than one grain (64.8 mg.) of codeine, or any of its salts, per one fluid ounce (29.5729 c.c.) or per one avoirdupois ounce (28.3 gms.), when such pharmaceutical preparations of narcotic drugs are administered, dispensed, or sold by persons and under conditions prescribed by the board."

Section 204.9, Code of Iowa, 1966:

> "204.9 Records to be kept. Medical practitioners, manufacturers, wholesalers, pharmacies, pharmacists, hospitals, laboratories, and every person who purchases for resale or who sells narcotic drugs, shall keep such records as may be required by the board relating to receipt, manufacture, inventory, distribution, including dispensing, administering, sale, or other disposition, and information as to narcotics stolen, lost, or destroyed. In every case the record of narcotic drugs received shall show the date of receipt, the name and address of the person from whom received, and the kind and quantity of drugs received; the kind and quantity of narcotic drugs produced or removed from process of manufacture, and the date of such production or removal from process of manufacture. The record of all narcotic drugs sold, administered, dispensed, or otherwise disposed of, shall show the date of selling, administering, or dispensing, the name and address of the person to whom, or for whose use, or the owner and species of animal for

which the drugs were sold, administered, or dispensed and the kind and quantity of drugs

"Every such record shall be kept for a period of five years from the date of the transaction recorded. The keeping of a record required by or under the federal narcotic laws containing substantially the same information as is specified by this chapter, shall constitute compliance with this section, except that every such record shall contain a detailed list of narcotic drugs lost, destroyed, or stolen, if any, the kind and quantity of such drugs, and the date of the discovery of such loss, destruction, or theft."

Section 204.20(1), Code of Iowa, 1966, reads in part:

"1. Any person violating any provision of this chapter, except as otherwise provided shall upon conviction be fined not more than two thousand dollars and shall be imprisoned in the state penitentiary not less than two or more than five years."

QUESTIONS PRESENTED

1. Does Subdivision 5 of Section 204.8, Code of Iowa, 1966, exempt the narcotic preparations as described therein from the record keeping provisions of Section 204.9, Code of Iowa, 1966?

2. Did Section 204.9, Code of Iowa, 1966, sufficiently give fair warning to the petitioner that his conduct was criminal, which warning he was entitled to under the Due Process Clause of the Fourteenth Amendment?

STATEMENT OF THE FACTS

An indictment was returned from the Polk County, Iowa, Grand Jury charging Marion Edward Williams, petitioner, with failure to keep proper records of narcotic

drugs pursuant to Section 204.9, Code of Iowa, 1966 (Original Trial Record, hereafter referred to as "R.", p. 3).

An audit was made by the Board of Pharmacy Examiners on January 4, 1967, of the Williams' Prescription Pharmacy, owned and operated by petitioner in Des Moines, Polk County, Iowa. The audit was conducted on Class X narcotics which included reviewing the invoices, the sales-made recorded in petitioner's exempt registry signature book and the inventory of items on hand (R. pp. 21-24). The audit covered four-ounce Robitussin A-C and four-ounce Elixir Terpin Hydrate and Codeine for the time period of July 1, 1966, to December 31, 1966. Petitioner's invoices from Des Moines Drug Company for that period of time showed purchases of 2,328 four-ounce bottles of Robitussin A-C and 66 four-ounce bottles of Elixir Terpin Hydrate and Codeine. The registry signature book showed sales of 1,961 four-ounce bottles of Robitussin A-C and no sales of Elixir Terpin Hydrate and Codeine (R. pp. 29-30).

On further investigation by the Board of Pharmacy Examiners at the Des Moines Drug Company nineteen other invoices of sales to petitioner covering 546 bottles of Robitussin A-C were discovered. None of these invoices were shown to the inspectors by petitioner (R. p. 32). In addition, investigation at the Iowa Drug Company in Des Moines, Iowa, disclosed twenty-nine invoices showing purchases by the petitioner of 1,392 four-ounce bottles of Robitussin A-C during the six month period involved. Again, petitioner produced none of these invoices for the inspectors (R. p. 31).

Petitioner was tried before a jury on September 30, 1968, in the District Court of Polk County, Iowa (R. p. 15). The evidence presented by the State established

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that petitioner had failed to produce several invoices containing purchases of Robitussin A-C and Elixir Terpin Hydrate and Codeine. At the close of the State's evidence, and again at the close of all the evidence, petitioner moved for a directed verdict on the ground that Section 204.8(5), Code of Iowa, 1966, exempted said drugs from all requirements of Chapter 204, Code of Iowa, 1966 (R. p. 67, pp. 84-85). The trial judge instructed the jury that the terms of Section 204.8(5) do not exempt these items from the record keeping requirement of Section 204.9 (R. p. 85).

Petitioner was found guilty, and on October 14, 1968, the court entered its final judgment fining petitioner $2,000 and sentencing him to serve two years in the state penitentiary (R. p. 95, pp. 100-101). This judgment was affirmed by the Supreme Court of Iowa, and a subsequent petition for rehearing was denied (Application, Appendix, p. 1(a)).

REASONS WHY THE WRIT SHOULD BE DENIED

CERTIORARI SHOULD NOT BE GRANTED AS PETITIONER WAS IN DIRECT VIOLATION OF A CLEAR, PLAIN AND UNAMBIGUOUS STATUTE WHICH DID NOT DEPRIVE HIM OF THE FAIR WARNING HE IS ENTITLED TO UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Petitioner's contention that he was not afforded the fair warning that his conduct was criminal as the Fourteenth Amendment so demands will be dealt with in accordance with Respondent's Questions Presented, supra.

1. Subdivision 5 of Section 204.8, Code of Iowa, 1966, does not exempt the narcotic preparations as described therein from the record keeping provisions of Section 204.9, Code of Iowa, 1966.

It is petitioner's contention that Section 204.8(5), Code of Iowa, 1966, exempts certain narcotic preparations for all purposes under Chapter 204; and more specifically from the record keeping provisions of Section 204.9.

Chapter 204 of the Iowa Code is modeled on the Uniform Narcotics Drug Act. We submit that Section 204.8(5) is not as all encompassing as petitioner would have us believe and that Section 204.8(5) exempts the preparations only from the prescription requirement. In support of this position we will compare the following statutes and case law.

Petitioner at page 14 of his Brief compares the applicable sections of Chapter 204, Code of Iowa, 1962, with the corresponding chapter of the 1966 Code.

Section 204.8, Code of Iowa, 1962, provided in part as follows:

> "Except as otherwise in this chapter *specifically* provided, this chapter shall not apply to the following cases:
>
> "Administering, dispensing, or selling at retail of any medicinal preparation that contains in one fluid ounce, or if a solid or semi-solid preparation, in one avoirdupois ounce, not more than one grain of codeine or of any of its salts." (Emphasis added).

Section 204.9, Code of Iowa, 1962, specifically provides that records be kept for "exempt narcotics" as follows:

* * *

> "4. Every person who purchases for resale, or who sells narcotic drug preparations exempted by section

204.8, shall keep a record showing the quantities and kinds thereof received and sold, or disposed of otherwise, in accordance with the provisions of subsection five of this section."

The 61st General Assembly of the State of Iowa repealed Chapter 204, supra, and enacted the present Chapter 204, Code of Iowa, 1966, by passing Chapter 195, Acts of the 61st General Assembly. There are substantial changes that should be noted.

The 1962 statutes exempted certain medicinal preparation from the provisions of Chapter 204 relative to the administering, dispensing or selling provisions of the Act unless ". . . otherwise specifically provided . . . ." It also used the term "'medicinal preparation" without defining what was meant by that term.

While there was a specific provision requiring records to be kept, Section 204.9(4), supra, actually required record keeping only for narcotic drug preparations exempted by Section 204.8, supra, and Section 204.8 spoke in terms of exempt medicinal preparations. There was a question of whether record keeping was required for the exempt medicinal preparation and even if there was such a thing as an exempt narcotic drug.

In the 61st General Assembly, the Iowa law was changed substantially. Chapter 195, Acts of the 61st General Assembly, Section 204.8, was changed to provide that the Board of Pharmacy Examiners could, if it made certain findings, grant exempt status to pharmaceutical preparations of narcotic drugs and permit the administering, dispensing or selling of such drugs under conditions prescribed by the Board. That section also provided that the Board could terminate the exempt status of such narcotic drug preparations under certain conditions. The Board

has not adopted any exemption from the application of the provisions of Section 204.9 (Application, Appendix, p. 7a).

The first paragraph of former Section 204.8, supra, and the provisions of Section 204.8(5), Code of Iowa, 1966, are worthy of comparison. The previous statute granted an exempt status from certain provisions of the chapter unless otherwise *specifically* provided. The present statute has deleted the word "specifically", and now provides in part as follows:

> "Except as otherwise provided this act shall not apply . . . ."

So, we find that two important changes were made in the law, i.e., the undefined term of medicinal preparation was deleted and the term "narcotic drug preparation" was used instead, and the term "specifically" was entirely deleted. It is not clear exactly what effect the word "specifically" had under the old law because of the undefined term "medicinal preparation" even though Section 204.9(4) was a specific provision for record keeping.

Petitioner argues that the changes in the law reflect a legislative intent to relieve persons of record keeping for "exempt narcotics". It is the State of Iowa's position that under either law, record keeping was and is necessary for "exempt narcotics". The provisions of Section 204.8, Code of Iowa, 1962 and Section 204.8(5), Code of Iowa, 1966, state that provisions of Chapter 204 shall not apply to the ". . . administering, dispensing or selling . . ." of any preparation which is classified as an "exempt medicinal preparation" or an "exempt narcotic drug".

A reading of the previous and present law shows that there are only six main areas of subject matter, to-wit:

1. Licensing
2. Sales
3. Professional use of narcotics
4. Exemption powers of the Board
5. Record keeping
6. Penalties

The petitioner alleges that Section 204.8(5) takes certain narcotic drugs entirely out of the purview of the chapter. However, the plain wording of that section says only that narcotic preparations of a certain strength shall not be subject to the administering, dispensing or selling provisions of the chapter. It says nothing about being exempt from the record keeping, licensing or penalty provisions of the chapter. Certainly, record keeping is entirely separate and apart from administering, dispensing or selling.

Uniform laws should endeavor to fulfill their purpose of uniformity in application throughout the various jurisdictions. Relative to their application in a particular jurisdiction the sister state interpretations are more than mere persuasive authority.

A considerable number of cases pertaining to this issue here presented are collected in 25 A.L.R.3d 1118, 1129 (1969). A review of these cases indicates that the unanimous decision of the Supreme Court of Iowa agrees with the findings of the other Courts.

In *Merritt* v. *State*, 245 Ind. 362, 198 N.S.2d 867 (1964), defendant was convicted of violating the Indiana Uniform Narcotic Drug Act by attempting to obtain a narcotic drug by use of a false name. The court, in affirming the conviction, said at 869, 870 of 198 N.E.2d:

> "However, it is also apparent that even though certain drugs containing a low percentage of a narcotic might be purchased without a physician's prescription, the law still required that a record be kept of the purchases and sales and to whom made.
>
> * * *
>
> "In other words, a narcotic drug of a certain percentage or less may be exempt from part of the provisions of the Uniform Narcotic Act and not other provisions thereof. That, in our judgment, is the case here. The act does exempt paregoric containing two grains or less of opium from the provisions with reference to a physician's prescription, etc., *but does not exempt the seller of such a drug from the requirement of keeping a record* of the sales nor the buyer from the penal provision when obtaining the same by use of deceit, fraud or the use of a false name. This appears to be the construction given in other states where similar questions have arisen. State v. Lee (1963), 62 Wash.2d 228, 382 P.2d 491; State v. Sanchez (1962), 13 Utah 2d 307, 373 P.2d 695." (Emphasis added).

This is the same interpretation as used by the Iowa court. The obvious reading of this Act is that the exemption section is *not* all encompassing, but applies only to the prescription requirement.

In *State* v. *Sanchez,* 13 Utah 2d 307, 373 P.2d 695 (1962), the defendant was convicted for obtaining a narcotic drug in violation of the Narcotic Drug Act. In affirming his conviction, the court said, at 696 of 373 P.2d:

> "The contention by appellant Sanchez that Sec. 58-13a-17 exempts from a violation of our Uniform Narcotic Drug Act the obtaining of a narcotic drug by fraud, deceit, misrepresentation or subterfuge, under Sec. 58-13a-35, unless the narcotic drug obtained

> contains in one fluid ounce more than one grain of codeine is not correct. Sec. 58-13a-17 provides that this act shall not apply to 'administering, dispensing, or selling at retail of any medicinal preparation' that does not contain more than one grain of codeine in one fluid ounce. This provision is limited to administering, dispensing or selling at retail. It has no application to obtaining by fraud, deceit, misrepresentation or subterfuge a narcotic drug. The act requires more than one grain of codeine in every fluid ounce of medicinal preparation, administered, dispensed or sold at retail in order for a violation, but appellant was not charged with dispensing a narcotic drug, but with fraudulently obtaining a medicinal narcotic drug preparation."

As the Utah Supreme Court observed, the exemption "provision is limited to administering, dispensing or selling," and it has no application to other provisions, including record keeping. Similar reasoning is used in *State* v. *Goodwin*, 181 Neb. 616, 150 N.W.2d 135 (1967).

2. The statutory provisions of Chapter 204, Code of Iowa, 1966, afforded the petitioner ample warning that his conduct was in direct violation thereof, as demanded by the Fourteenth Amendment.

Under Section 204.8(5) the items in question are exempt *only* from the prescription requirement; only from the "administering, dispensing, or selling" of such drugs. Nothing in that section exempts the items from the provisions of Section 204.9.

Petitioner contends that, since the Board of Pharmacy Examiners failed to prescribe rules regarding record keeping under Section 204.9 and stated that these items are exempt under Iowa law, his actions do not fall under the purview of Section 204.9.

On further reading of Section 204.9, the first sentence, when read alone, might indicate that records are required only when the Board so dictates. However the remaining part of this section states which records shall be kept "in every case" and specifies the information required.

> "In *every* case the record of *narcotic drugs* received shall show the dates of receipt, the name and address of the person from whom received, and the kind and quantity of drugs received . . . . The record of *all* narcotic drugs sold . . . shall show . . . ." (Emphasis added).

Obviously then, under the first sentence of Section 204.9, the prerogative of the Board is only to specify a certain type or form of record, not whether such records should be maintained.

Quoting from the Supreme Court of Iowa's decision in this case (Application, Appendix, p. 12a):

> " 'Every' means each one of all. 15 Words & Phrases, Perm.Ed., pages 792-794. It has substantially the same meaning as 'all' which is later used in the same section. In Consolidated Freightways Corp. v. Nicholas, 258 Iowa 115, 121, 137 N.W.2d 900, 904, we say: 'The word "all" is commonly understood and usually does not admit of an exception, addition or exclusion.' "

We submit, on reading Section 204.9, that there is no logical reason for the word "every" to "admit of an exception, addition or exclusion".

When reading the statute as a whole, records are required to be kept. The last paragraph of Section 204.9 reads:

> "The keeping of a record required by or under the federal narcotic laws containing substantially the same information as is specified by this chapter, shall constitute compliance with this section . . . ."

The plain meaning of the above cited phrase is that Section 204.9 requires records to be kept as does the federal narcotics laws.

Again quoting from the Supreme Court of Iowa's decision on this case (Application, Appendix, p. 11a):

> "However, a statute is not so vague and uncertain as to be void where the meaning of words used can be fairly ascertained by reference to similar statutes, other judicial determinations, reference to the common law, to the dictionary, or if the words themselves have a common and generally accepted meaning. Powers v. McCullough, 258 Iowa 738, 746, 140 N.W.2d 378, 384, and citations."

It appears, therefore, that petitioner assumed too much from the revisions in the 1966 Code of Iowa. A reading of Chapter 204, and specifically Section 204.8(5), clearly indicates that certain drugs, including Robitussin A-C and Elixir Terpin Hydrate and Codeine, are exempt from the prescription requirement. The following Section 204.9 makes it equally clear that no narcotic drug is exempt from the requirement of keeping a record of purchases, sales and other transactions. The petitioner was found guilty of failing to keep proper records, in violation of Section 204.9. This verdict was affirmed unanimously by the Supreme Court of Iowa, and their construction of Section 204.9 was a fair and reasonable interpretation of a clear and unambiguous statute which sufficiently warned petitioner that his conduct was criminal.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

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